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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 166

D. L. PIAZZA COMPANY, a partnership composed of DAVID L. PIAZZA, SAMUEL L. PIAZZA and PROVIDENCE PIAZZA, co-partners,

Petitioner,

vs.

WEST COAST LINE, INC. a corporation, WESSEL, DUVAL & CO., INC., a corporation, J. LAURITZEN, a partnership of Copenhagen, Denmark, and UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

Although on June 30, 1954, counsel for the private respondents, West Coast Line, Inc., Wessel, Duval & Co., Inc., and J. Lauritzen, accepted in writing service of the record and the petition for writ of certiorari as shown by the proof of service filed herein, no brief in opposition to the petition has been filed on behalf of the private respondent water carriers against whom the petitioner, a shipper, seeks money damages in this proceeding in

the form of reparations for rates and charges wrongfully obtained by them from petitioner.

The only brief filed in opposition to the petition has been filed on behalf of the respondents, United States of America and Federal Maritime Board (sometimes hereinafter referred to collectively as "the Government"). The Government does not dispute the correctness of the Statement of the Case in the petition. Its own Statement, however, is misleading because it misrepresents the nature of the proceedings instituted by the petitioner, both before the administrative agency involved and in the District Court. The complaints filed before the Board and in the District Court both charged that the receiving, handling and delivering of plaintiff's cargo by the private respondents were unjust, unreasonable and conducted under the false pretense that the private respondents were to carry the cargo under an exclusive use voyage Charter Party Agreement at rates highly in excess of applicable liner service rates, and that although such rates were paid by the petitioner, the private respondent carriers rendered liner service with ensuing deviation rather than the exclusive, direct voyage promised (R. 5, 6, 7). It is at once apparent that the primary purpose of the complaint and the nature of the proceedings filed in the District Court was not to find, as the Government's Statement would have it, that "the Board's 'report, findings and orders are erroneous, invalid, unlawful and void'" (Government's Brief, p. 7), but was to recover a judgment for money damages as reparations (R. 12).

ARGUMENT.

1. The root of the controversy herein concerns money damages and therefore judicial review of the Board's order can be had only under Section 30 of the Shipping Act of 1916, as amended, (46 U.S.C. 829).

(Reply to point 1 of Government's Argument, pp. 9-13)

The brief of the Government travels on a fallacy that misconstrues the nature of this proceeding.

The Government endeavors to transform a proceeding that seeks the recovery of money damages for past wrongs into a proceeding in equity. Thereby it seeks to justify the action of the courts below—on the *sole* basis that the action is "plainly (*sic*) one to set aside the order of the Board" (Government's Brief, p. 8).

This Court, in the case where the Government itself was a shipper and (like the petitioner here) sought relief notwithstanding an administrative order *denying* to it reparations, described the nature of the controversy involved as follows: "While the Government here does not seek *enforcement* of a Commission order for the payment of money, *the root of the controversy concerns the payment of money damages* under 49 U.S.C. §§ 8, 9." *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 443, (Our emphasis and see our Petition, pp. 22-23).

Similarly, the root of the controversy in the instant reparations case concerns the payment of money damages.

The Government's Brief attempts to distinguish the holding in *U. S.* v. *Interstate Commerce Commission*, 337

U.S. 426, by contending that there this Court found jurisdiction to entertain proceedings that challenged administrative determination reached under the Interstate Commerce Act on one isolated section of another statute—the Urgent Deficiencies Act— *but* that section merely says that challenge shall be allowed—without stating whether that jurisdiction should be in one kind of court or another (28 U.S.C.A. 1336, quoted at p. 5a of the Appendix to the Petition). Herein the Government concedes that judicial review of an administrative order provided *by the Urgent Deficiencies Act* would be by a *three-judge* court "normally (*sic*) convened". (Government's Brief, p. 13, and see 28 U.S.C. 2325, quoted at page 5a of the Appendix to the Petition.)

The Government's Brief wholly overlooks that the only proceeding authorized by the Urgent Deficiencies Act is, indeed, a three-judge court; whereas, this Court recognized that Section 16 (2) of the Interstate Commerce Act put proceedings for the recovery of reparations in a class by themselves for the purposes of further judicial proceedings following administrative determinations, and accordingy held that such review should be before the single-judge district court contemplated by said Section 16 (2) of the Interstate Commerce Act. This Court's decision, therefore, under such statutes as Section 16(2) of the Interstate Commerce Act, involved in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, and *the parallel Section 30 of the Shipping Act*, relied upon by the petitioner, sets apart reparation proceedings for recovery of money damages for trial by a one-judge court—which carries the right to a jury.

Section 16(2) of the Interstate Commerce Act and Section 30 of the Shipping Act are deliberately parallel (see pages 4-5 of the Petition). This Court, under the first

of these deliberately parallel sections, held that a one-judge district court has power to act whether the suit relies on or whether the suit attacks the administrative result as respects the reparations sought. This Court's reasoning was, specifically (337 U.S. at 443):

> "For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes. We think the orders *in both instances* should be reviewed by the same one-judge tribunal." (Our emphasis).

It is submitted that a construction to limit these deliberately parallel sections of the Interstate Commerce Act and the Shipping Act to *enforcement* of administrative orders, as the superficially verbal argument of the Government would now have it, is contrary to the holding of this Court, above quoted (and contrary to the position of the Government when the Government was the shipper.)

It is submitted further that in such a statutory situation, whether the proceeding arises under the Interstate Commerce Act or under the Shipping Act, it is the *reparations* proceeding that this Court by statutory construction in *United States* v. *Interstate Commerce Commission* holds is carved out from the three-judge proceeding, that acts without a jury and on the administrative record alone. For Congress cannot be supposed to have given the plaintiff, who relies on the administrative result, the advantages of a jury trial—while denying them to the plaintiff who challenges the administrative result. Beyond the considerations of logic and fairness supporting that construction is the further consideration that any other construction would raise grave doubts of the Constitutional validity of the leigslation.

2. The construction of the statutes by the court below does result in an unconstitutional deprivation of the right of jury trial to which the parties to reparation proceedings are entitled under the Seventh Amendment and does permit such palpable discrimination against a shipper challenging the administrative order as to be violative of the Due Process Clause of the Fifth Amendment.

(Reply to point 2 of Government's Argument, pp. 13-16)

The Government argues that the fundamental constitutional objections raised by petitioner are without substance. Here again appears the fallacy on which the brief of the Government travels. The argument is made by the Government that petitioner's proceeding is predicated upon rights created by Congress and that Congress therefore had the power to define the remedies which petitioner might pursue. As was pointed out at pages 11-12 of our Petition, the Shipping Act gives and codifies many rights that sound only at common law. See: 46 U. S. C. §§ 812, 815, 816. As we there pointed out, promissory misrepresentation where moneys have been obtained by fraudulent pretense is actionable at law. *Kaufman* v. *John Block and Co.*, 60 F. Supp. 992, 993 (S. D. N. Y., 1945). The complaint herein charges that the respondent carriers resorted to unfair and discriminatory methods under a fraudulent pretense to induce the petitioner to pay rates highly in excess of the applicable rates for the services that were actually rendered in lieu of what was fraudulently held out. (R. 5, 6, 7) Such fraudulent inducement by representations of future conduct that are mere pretense, which are not and never were intended to be kept, is actionable at law (Auth. cit.). As we pointed out in our petition at pages 10 and 12, the Shipping Act does not give the shipper the election to proceed at law in the first instance without preliminary recourse to the Board, yet the argument of the

Government seeks to limit the review of a denial of reparations to the shipper to a proceeding "in the nature of a suit in equity." (Government's Brief, p. 15). The early history of proceedings under the Interstate Commerce Act convincingly rejects the extraordinary notion that review of *reparations* proceedings—proceedings to recover money damages for past wrongs—could be by resort to equity. Indeed, until the Act was amended, the Interstate Commerce Commission itself refused to award *reparations* on the sole ground that under the Seventh Amendment an award would be a nullity where review of the order could be only by resort to a court of equity—as was provided by the original language of the Act.

In the case of *Lehigh Valley R. Co.* v. *Clark*, 207 Fed. 717 (C. A. 3, 1913), the Court of Appeals for the Third Circuit, after recapitulating the early history of the Interstate Commerce Act, clearly stated the distinction between the provisions of the Interstate Commerce Act governing reparations cases and those governing the rule-making functions of the administrative agency, which the Government's present argument would tend to merge, stating at pages 723, 724:

> "As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation thereof *in futuro*, in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the Act. *The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof.* It makes redress of a private injury actually suffered, possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by mak-

ing it depend in certain cases upon the precedent award of reparation by the Commission, such award is not of the nature of the administrative functions conferred on that body.

"In the case of *Western N. Y. & P. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, 70 C. C. A. 23, which was decided with reference to the original Act, as amended by the Act of 1889, we said:

> 'In the proceedings at law under section 16, as amended, for the enforcement of an order or requirement of the commission, *the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right.* The procedure contemplated by the act and, unless waived, *required by the Constitution,* is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury.'

"The judgment in this case was affirmed by the Supreme Court, with no criticism of the language quoted. *Penn Refining Co.* v. *West N. Y. & P. R. R. Co.*, 208 U. S. 208, 28 Sup. Ct. 268 52 L. Ed. 456." (Our emphasis)

The case upon which the Government relies chiefly to deny the right to jury trial, namely, *Amalgamated Utility Workers* v. *Edison Co.*, 309 U. S. 261, 264, was a contempt proceeding to enforce an injunction! In the other case relied upon by the Government, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48-49, this Court made a clear-cut distinction as to the application of the Seventh Amendment where the proceeding authorized by the statute is in the nature of a suit at common law and where it is one unknown to the common law. We hardly suppose that the Government means by its argument to renew the contention recently

and emphatically rejected by Judge Fake in *United States* v. *Jepson*, 90 F. Supp. 983. The Government there sought to recover rents collected by the defendant in excess of maximum legal rents established by the Emergency Price Control Act, contending, as it does here, that since the action is of statutory origin (and even an emergency right created by Congress) defendant was not entitled to a jury trial. Judge Fake, in holding that rights of litigants to recover money damages have long been recognized as suits at common law in this country, stated at pages 984-985:

> "Long prior to our independence there had grown up under original writs certain well-defined actions at common law, among them, the action of debt covering, among other causes, suits for statutory penalties and *qui tam* actions. See Chitty on Pleadings, Vol. I, Seventh American Edition, page 126. That such an action was recognized as a suit at common law in this country, in the year 1795, is made sparklingly clear in *U. S.* v. *Mundell*, 27 Fed. Cas. 23, No. 15,834. In that case the court had before it the problem as to just what was meant by 'trials at common law' and it is there pointed out that 'A distinction is sometimes taken between a suit at common law and a suit upon a statute, where the latter is grounded upon different principles from the former, in which case perhaps it may properly be said that the one is a trial at common law, the other upon the statute • • • thus, in this case, though it be an action of debt, which is a common law action, and will be tried in a common law manner, • • • whatever, therefore, the laws order anyone to pay, that instantly becomes a debt which he hath beforehand contracted to discharge.'"

Accordingly, Judge Fake concluded, at page 986:

> "It is my thought that when a federal statute embraces a common-law form of action, that action does

not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. *To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments.* It is by such methods that courts lose their power to enforce the Bill of Rights.

"An order will be entered herein providing for a trial by jury on the issues joined on the first count of the complaint. The trial of the equitable issues will be stayed abiding the event of the jury trial." (Our emphasis)

The Government relies upon the comment of Mr. Justice Frankfurter in his dissenting opinion in *United States* v. *Interstate Commerce Commission*, 337 U. S. at 446 to the effect that it will hardly be suggested that the Constitution requires judicial review of a reparation order by the Commission. Mr. Justice Frankfurter there states that such a notion is precluded by *Cary* v. *Curtis*, 3 How. 236. Since that case held that an action of assumpsit for money had and received would not lie against the collector of the customs for the return of duties received by him in his official capacity and which he was required by Act of Congress to place to the credit of the Treasurer of the United States, its holding cannot govern the Constitutional issues here presented.[1] The early history of the parallel Interstate Commerce Act and its judicial construction emphasizes that insofar as reparation proceedings were concerned, "the procedure contemplated by the Act and * * * required by the Constitution,

[1] Apart from the ominous implications (see dissent of Story, J.) of the doctrine of Cary v. Curtis—that sovereign immunity protects the person who, under color of office but without right in law, takes the money of the citizen from answering to any tribunal (whether law or equity) save by the sovereign's grace and consent—such a doctrine has no relevance here. It is not the Government, but the private respondents, who wrongfully took and wrongfully retain the petitioner's money.

is a jury trial accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury." (*Western N. Y. & P. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, (C. A. 3, 1905), aff'd 208 U. S. 208. Furthermore, as we pointed out at pages 10-13 of our Petition, and to which the Government's brief makes no answer, this Court in the case of *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448 at 458, recognized the Constitutional right of trial by jury for shipper and carrier alike in reparation proceedings, when this Court pointed out that Congress, under Section 9 of the Interstate Commerce Act, as amended, expressly gave the shipper the option to seek reparation in the first instance before the district court, where he could have a trial by jury. Section 22 of the Shipping Act (46 U. S. C. 821) gives no such election but requires shippers claiming reparations to resort to the Administrator in the first instance in all cases. To construe the Judicial Review Act (5 U. S. C. 1032) to deprive the shipper of his constitutional right to a jury trial in a reparation proceeding to recover money damages for past wrongs renders that Act plainly unconstitutional and ignores the clearly constitutional alternative spelled out by this Court in the *United States* v. *Interstate Commerce Commission*, 337 U. S. 426.[2]

It is also significant that the Government's argument does not meet the Fifth Amendment question set forth in our petition at pages 13-15. The construction of the statutes urged by the Government does deny to the shipper

[2] The Government does not meet the construction question governed by the cardinal principle enunciated by this Court in Crowell v. Benson, 285 U. S. 22, 62 and reaffirmed in Ashwander v. Tennessee Valley Authority, 297 U. S. 288 that when the validity of an Act of Congress is drawn in question and even if a serious doubt of constitutionality is raised, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. See our Petition at pages 12 and 13 to which the Government makes no answer.

who attacks the administrative order all right to jury trial but the statutes plainly give the carrier, against whom the shipper would enforce exactly the same reparations claim, the right to review in a one-judge district court where he may have trial by jury. The discrimination is at once apparent and is palpable, gross and baseless. *Bolling* v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 694 (May 17, 1954). To this the Government has made no answer.

3. The Question of Jurisdiction under the Judicial Code, independent of the Shipping Act.

(Reply to point 3 of Government's Argument, pp. 16-18)

The Government's argument here continues to travel on the same fallacy that appears throughout its brief. Its argument confuses the distinction between a reparations proceeding—wherein the "basic" matter is the shipper's right to recover money damages as this Court put it in the case of *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 443—with the totally different situation in which the only relief sought is *quia timet* to enjoin official action. The Government's argument further ignores the fundamental fact that the Shipping Act *codifies* many rights that sound only at common law and yet requires the shipper to resort in the first instance to the Administrator for relief of violations of such rights. Such violations are charged in the complaint filed by the petitioner in the District Court (R. 5, 6, 7). The Government makes no answer to the authorities cited at pages 22-23 of the Petition that describe such proceedings before the administrative body simply as a necessary condition precedent to the bringing of an action at law.

CONCLUSION.

The private respondent carriers have made no answer to the Petition. The Government's brief urges a construction of the statutes that more than raises grave doubts as to the Constitutional validity thereof and that is in conflict with decisions of this Court and Courts of Appeals of other circuits under parallel provisions of the Interstate Commerce Act and that would create direct conflict between the interpretation of such parallel legislation.

For the reasons hereinabove stated and set forth in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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